PANTAI BAYU INDAH SDN BHD

v.

MMC ENGINEERING SERVICES SDN BHD & ANOR

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD J
[ORIGINATING SUMMONS NO: 24-140-2002 (MR)]
19 FEBRUARY 2004

CIVIL PROCEDURE: *Injunction - Damages - Undertaking as to damages - Application to assess damages - Application made two years after limitation period - Whether application statute-barred - Whether item 32 of Schedule to Limitation Ordinance (Cap 49) (Sarawak) applied - Whether stay of execution would suspend running of time prescribed*

CIVIL PROCEDURE: *Injunction - Damages - Assessment of damages in respect of ex parte injunction - Ex parte injunction not set aside on ground that it was wrongly granted - Whether application for assessment of damages ought to be allowed*

The plaintiff appointed the defendants as contractors for land reclamation works. Pursuant to a contract, a bank guarantee for a performance bond in favour of the plaintiff was obtained. Subsequently, as a result of defaults in the contract, the plaintiff terminated the contract and demanded payment on the performance bond. On 6 October 1997, the defendants obtained an *ex parte* injunction restraining the plaintiff from demanding on the performance bond subject to the condition that the defendants would undertake to abide by any court order for damages suffered by the plaintiff resulting from the injunction. The injunction was discharged on 18 November 1997 on the hearing of the *inter partes* application. A stay of execution was granted on the defendants' application pending determination of their appeal. The appeal was dismissed by the Court of Appeal on 23 November 2000 and payment on the performance bond was made on 14 January 2001. The plaintiff alleged that the *ex parte* injunction deprived the plaintiff of the use of the performance bond from 29 September 1997 to 14 January 2001. On 28 August 2002, the plaintiff applied for an inquiry to establish damages suffered by the plaintiff by reason of the *ex parte* injunction. The defendants opposed the application contending that the plaintiff had failed to apply to set aside the injunctive order and that the application was statute barred under item 32 of the Schedule to the Limitation Ordinance (Cap 49) (Sarawak).

Held (dismissing the plaintiff's application with costs):

[1] Item 32 of the Limitation Ordinance applied and the plaintiff's application was statute-barred. The stay of execution would not suspend the running of the time prescribed for such a claim. (p 476 g-h)

[2] In the present application the plaintiff sought to proceed with the application for assessment of damages without first proceeding to set aside the *ex parte* injunction on the ground that it was wrongly granted. The application therefore failed on this ground and ought to be dismissed with costs. (p 477 g)

Case(s) referred to:
Elias Mooin v. Dato' Zainal Abidin Johari [1997] 3 CLJ 455 HC ***(refd)***
Kong Ming Bank Berhad v. Sim Siok Eng [1982] 2 MLJ 205 ***(refd)***
RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd [2002] 3 CLJ 83 CA ***(refd)***

Legislation referred to:
Limitation Ordinance (Cap 49) (Sarawak), item 32

Other source(s) referred to:
BB Mitra, *Limitation Act 1963,* 20th edn, p. 894

For the plaintiff - Jimmy HT Wee; M/s Jimmy HT Wee & Co
For the defendants - KY Lin; M/s Kadir, Wong, Lin & Co

Reported by Andrew Christopher Simon

JUDGMENT

Sulaiman Daud J:
By this originating summons the plaintiff claims against the first and second defendants the following reliefs:

(a) that an inquiry be conducted to establish whether the plaintiff has sustained any and if any what damages by reason of the order dated 6 October 1997 which the first and second defendants ought to pay according to their undertaking contained therein.

(b) interest thereon at 8% from the date of order until full settlement.

(c) That the costs of this application be costs in the cause.

The plaintiff's application is supported by the affidavits of Tham Kit Chong affirmed on 28 October 2002 (encl. 2), on 14 November 2002 (encl. 12) and on 2 December 2002 (encl. 16). The defendants opposed the present application by filing the affidavits of Yoong Nim Chee affirmed on 29 October 2002 (encl. 10), on 21 November 2002 (encl. 14) and on 16 December 2002 (encl. 18).

Facts Of The Case

The following facts are not disputed. The plaintiff, a private limited company, is engaged in the reclamation works for the development of a Marina Park comprising mixture of commercial and housing development ("the project"). On or about 16 May 1996 the plaintiff appointed the defendants as their contractor for land reclamation works of approximately 139 hectares for the purpose of the project. Pursuant to the terms of the contract entered between them, on 7 August 1996 the parties caused to be issued a bank guarantee for performance bond from Perwira Affin Bank ("the bank") in favour of the plaintiff in the amount of RM8,568,849.85. The said work commenced on 22 May 1996. The plaintiff asserted that the defendants had persistently or flagrantly neglected to comply with their obligation under the contract.

Consequently by letter dated 10 September 1997 the engineer of the contract certified that the defendants have defaulted in the contract. As a result of the said letter the plaintiff, upon notice, terminated the contract and demanded for the payment of the performance bond. On 6 October 1997 the defendants obtained an *ex parte* injunction to restrain the plaintiff from demanding the performance bond subject to the condition that the defendants will undertake to abide by any order of the court as to damages suffered by the plaintiff resulting therefrom. The said injunction was subsequently discharged on 18 November 1997 upon the hearing of the *inter partes* application. On the defendants' application, the court granted stay of execution of the order discharging the injunction pending the determination of the defendants' appeal. On 23 November 2000 the defendants' appeal was dismissed by the Court of Appeal. Payment of the performance bond was made by the bank to the plaintiff on 14 January 2001.

The plaintiff alleged that the grant of the said *ex parte* injunction has deprived the plaintiff of the use of the said sum of RM8,568,849 from 29 September 1997 to 14 January 2001, and by this application prays for an inquiry to be held in respect thereof.

In opposing the application the defendants contend that the said injunctive order was granted on 6 October 1997 and it automatically lapsed on 21 October 1997, and that the plaintiff made no application to set aside the *ex parte* order. By reason thereof it is asserted that the plaintiff is not entitled to claim any damages based on the said order. Further the learned counsel for the defendants also submitted that the present action is statue-barred under item 32 of the Schedule to the Limitation Ordinance (Cap 49).

Whether Application Statue-Barred

I will firstly deal with the issue of limitation. In *Kong Ming Bank Berhad v. Sim Siok Eng* [1982] 2 MLJ 205, Lord Scarman observed that the Limitation Ordinance of Sarawak is based on Indian legislation. The law relating to limitation for the time being in force in India is the Limitation Act 1963, where art. 90 thereof is in *pari materia* with the said item 32. On the interpretation of the said art. 90, the learned counsel for the defendants referred to BB Mitra the *Limitation Act 1963*, 20th edn, which states, at p. 894, that the limitation for a suit for damages for injury caused by injunction wrongfully obtained commences as soon as the injunction order ceases to have effect. The cause of action commences as soon as the injunction comes to an end.

The learned counsel pointed out that the *ex parte* injunctive order which was granted on 6 October 1997 automatically lapsed on 20 October 1997 under O. 29 r. 1(2B) of the RHC 1980. For the said reason he submitted that this application which was made on 28 August 2002 is nearly two years after the expiry of the said limitation period. The learned counsel for the plaintiff on the other hand argued that item 97 instead of item 32 is applicable. It is submitted that the plaintiff's claim is not for compensation arising from the said *ex parte* injunction but arose from the undertaking given by the defendants. With respect I cannot agree with the plaintiff's contention. In my view the undertaking given by the defendants to the plaintiff is very much related to the *ex parte* injunctive order so obtained. In essence it is an undertaking by the defendant to compensate the plaintiff if, upon the hearing of the *inter partes* application, the court finds that the *ex parte* injunctive order should not have been granted at the first instance.

I agree with the learned counsel for the defendants that item 32 of the Limitation Ordinance applies and that the present application is statue-barred. The stay of execution of the *inter partes* order will not in my view suspend the running of the time prescribed for such claim. I will dismiss the present application on this ground alone.

Failure To Set Aside The *Ex Parte* Injunctive Order

For completeness I will next consider whether the failure on the part of the plaintiff to set aside the injunctive order before the expiry thereof will deprived the plaintiff of the right to enforce the undertaking for damages thereunder. The learned counsel for the defendants answered in the positive. In support thereof he referred to *Elias Bin Mooin v. Dato' Zainal Abidin bin Johari* [1997] 3 CLJ 455, where one of the issue before the court is whether the defendant's failure to revoke or set aside an *ex parte* injunction will exclude its right from claiming damages for the period when it existed. On this issue James Foong J in his judgment said, at p. 459:

> ... The defendant without putting forward any application to revoke or set aside the *ex parte* injunction within the period of two weeks upon its granting must have accepted that this *ex parte* interim injunction was properly taken out. When this is so, he must be excluded from claiming damages for the period when it existed ... .

I fully agree with the aforesaid proposition. When the court hears the application, *inter partes*, the issue is whether the court should or should not grant a fresh injunction *inter partes*. The court is not considering whether or not to extend the *ex parte* order, which cannot be extended beyond 14 days (see *RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83). The question as to whether the *ex parte* order was wrongly granted or otherwise is not an issue for determination at the hearing of the *inter partes* application. The same will only be in issue in an application to set aside the *ex parte* order. If in the meantime the *ex parte* order has lapsed, the court should nevertheless hear the application, not for the purpose of setting it aside or not, because it has lapsed, but for the purpose of determining whether that *ex parte* order should or should not have been made in the first place (per Abdul Hamid B Mohamad HMR in *RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83.

In the present application the plaintiff seeks to proceed with the application for assessment of damages without first proceeding to set aside the *ex parte* injunction on the ground that the same was wrongly granted. The plaintiff's application must also fail on this ground.

Accordingly I dismiss the plaintiffs application herein with costs.